Supreme Court, U. S.
FILED
MAY 25 1977
MICHAEL RODAK, JR., CLERK

No. 76-1281

In the Supreme Court of the United States

OCTOBER TERM, 1976

CHURCHILL FOREST INDUSTRIES (MANITOBA) LTD., ET AL.,
PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1281

CHURCHILL FOREST INDUSTRIES (MANITOBA) LTD., ET AL.,
PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

In an attempt to show that the decision below conflicts with the Second Circuit's decision in *Bersch* v. *Drexel Firestone, Inc.*, 519 F. 2d 974, certiorari denied *sub nom. Bersch* v. *Arthur Andersen & Co.*, 423 U.S. 1018, petitioners assert (Rep. Mem. 6):

> **[O]n substantially identical conduct within the United States, the Second Circuit [in *Bersch*] held that no jurisdiction existed on sales to foreigners abroad while the Third Circuit [here] held to the contrary.**

This is a misstatement. The holding of lack of jurisdiction in *Bersch* was based on the court's finding that all of the fraudulent acts allegedly perpetrated on the foreign

claimants—as distinguished from activities which were "merely preparatory" to that fraud (519 F. 2d at 987)—were committed outside the United States. Thus, the court found (519 F. 2d at 987):

> The fraud, if there was one, was committed by placing the allegedly false and misleading prospectus in the purchasers' hands. Here the final prospectus emanated from a foreign source--London or Brussels in the case of the Drexel offering, Toronto in the case of the Crang offering, and apparently the Bahamas and Geneva in the case of the IOB offering.

Here, in contrast, the complaint alleges that the misrepresentations emanated from the United States and that in some instances those misrepresentations were even received by the investor's representatives while in the United States (see p. 6 of the Commission's brief in opposition).

In asserting (Rep. Mem. 3) that the present case and *Bersch* involve "substantial identity of the facts," petitioners also state that *Bersch* involved (Rep. Mem. 4):

> Mailing by defendants of offer (prospectus containing false representations) to some persons in U.S. who accepted offer by executing subscription in, and mailing from, U.S.

But that mailing and acceptance related not to the claims of foreign investors, but to the claims asserted by American investors, as to which the court in *Bersch* upheld jurisdiction. 519 F. 2d at 990, 991. Accordingly, the "substantial identity of the facts" upon which petitioners rely does not support their claim of a conflict between *Bersch* and the decision below upholding jurisdiction here.

For the reasons stated in this supplemental memorandum and the Commission's brief in opposition, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1977.